

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 805 OF 2005
WITH
CIVIL APPLICATION NO. 942 OF 2005

Shaikh Akbar s/o Babu Ahmed .. Petitioner

versus

Municipal Corporation of Gr.Mumbai .. Respondents

...

Mr.A.Y. Sakhare with R.A. Thorat for the
petitioner.

Ms.Geeta Joglekar for the respondents

CORAM : B.H. MARLLAPALLE, J

ORDER RESERVED : 18th August 2005.

ORDER PRONOUNCED : 24th August 2005.

ORAL ORDER :-

1. Heard Mr.Sakhare, learned Sr. Counsel for
the appellant and Mrs.Geeta Joglekar for the
respondent.

2. Being aggrieved by the order passed by the Asstt. Municipal Commissioner 'A' Ward of the Brihan Mumbai Mahanagar Palika on 11th February 2005, the appellant filed L.C. Suit no. 834 of 2005 and in the same suit, Notice of Motion no.725 of 2005 was taken out for temporary injunction. By the impugned order dated 5th August 2005 passed by the learned Judge of the City Civil Court, Gr. Mumbai, the said Notice of Motion has been dismissed.

3. On or about 22nd January 2005, respondent corporation issued a show cause notice u/s.351 of the Mumbai Municipal Corporation Act (for short 'MMC Act') regarding unauthorised structures as shown in the sketch and marked as portion 'D' and the mezzanine floor on the godown portion marked as 'A', 'B' and 'C'. Notice further states that there was unauthorised change of user in respect of the godown marked as 'A', 'B' and 'C'. This show cause notice was addressed to the owners i.e. the addressee/Manager of Haji Sabu Siddique Musaffir Khana and the occupier of Zillion shop in the premises of the trust. Both of them separately

submitted their replies through respective Advocates to the show cause notice and after considering these replies, the order dated 11th February 2005 was passed by the Asstt. Commissioner.

4. The trial court referred to the documents submitted before the Asstt. Commissioner along with the replies to the show cause notice as well as the findings recorded by the Asstt. Commissioner in his order dated 11th February 2005 and it came to the conclusion that there was no prima facie case made out for an order of temporary injunction under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure.

5. Mr. Sakhare, learned Sr. Counsel has referred to the agreements dated 4th April 2002 entered between the appellant plaintiff and the trust and submitted that when the suit premises were put in possession of the plaintiff pursuant to the agreement of tenancy, the said structures were already existing and the assessment record for levying taxes indicate that they were existing much prior to the date of the tenancy agreements. The construction of the mezzanine floor could not be treated to be illegal in as much as it could not be termed as a structure

separate from the godown marked as 'A', 'B' and 'C'. Height of these godowns permitted some partition to be made for storage purposes and there were no mezzanine floor rooms. So far as the structure marked as 'D' is concerned, it was submitted that once it was subjected to levying taxes, it could not be said that it was an illegal structure. Learned Sr. Counsel therefore submitted that the trial Court fell in manifest error by rejecting the application for temporary injunction and on the contrary this was a fit case to protect the structures during the pendency of the suit.

6. The fact remains that the trust did not take steps to challenge the order passed by the Asstt. Municipal Commissioner on 11th February 2005 and it was only the appellant tenant/occupier who has filed a suit against the said order. The trust being a separate legal entity, it was imperative for it to submit before the Asstt. Commissioner along with its reply, the necessary documents like sanctioned plans etc. in support of the structure ground plus one and marked as portion 'D'. The same was not done and it has been noted by the Asstt. Commissioner that the said structure was beyond the line of the

boundary/godown 'A', 'B' and 'C'. Undoubtedly, this structure is standing in the open space and prima facie there is nothing to show that it was an authorised structure.

. Similarly, the mezzanine floor put up on the godown marked as 'A', 'B' and 'C' has not been supported by prima facie evidence to show that they were unauthorised structures, either before the Asstt. Commissioner or before the trial court. The plaintiff cannot remain contented by relying upon the agreements for tenancy. When the trust did not challenge the order passed by the Asstt. Municipal Commissioner on 11th February 2005, it is presumed that as the owner of the entire premises, it accepted the said order. This presumption also goes against the plaintiff for deciding prima facie case in respect of the prayer for temporary injunction as well as the balance of convenience. By reading the order dated 11th February 2005 Mrs. Geeta Joglekar, learned counsel for the respondent corporation pointed out that consequent to the order dated 11th February 2005 only unauthorised structures i.e. mezzanine floor and portion marked as 'D' would only be subjected to demolition and the godown marked as

'A' 'B' and 'C' would not face such an action on account of the alleged change of user. On the ground of change of user, there would be separate proceedings initiated under the Act.

7. In the premises, there is no case made out in support of the prayer for temporary injunction in respect of the mezzanine floor and the portion marked as 'D' and hence, the reasoning set out by the trial court while dismissing the Notice of Motion cannot be termed as perverse or illegal.

8. Thus, this appeal fails at the threshold and the same is hereby dismissed in limine. Civil Application no. 942 of 2005 does not survive.

B.H. MARLAPALLE, J